WAI CHAN LEONG

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
AJAIB SINGH SCJ
GUNN CHIT TUAN SCJ
[SUPREME COURT CRIMINAL APPEAL NO. 84 OF 1987]
29 AUGUST 1989

EVIDENCE: *Information giving during police custody leading to discovery - Whether inadmissible as evidence - Under s. 37A of the Dangerous Drugs Act - Whether s. 37A overrides s. 27 of the Evidence Act 1950 - Section 113 of the Criminal Procedure Code.*

The appellant was convicted and sentenced to death by the High Court for trafficking under s. 39(1)(a) of the Dangerous Drugs Act 1952. He appealed against the conviction and sentenced on 6 grounds. However, only the following grounds were taken to be worthy of considertion.

(a) The learned Judge erred in law that he had failed to evaluate the evidence led by the Prosecution relating to information leading to discovery.

(b) The learned Judge erred in law in allowing and admitting inadmissible evidence.

The appellant was arrested at Jalan Kalang, off Jalan Sungai Besi, K.L. where 5 packets containing 15.5 gm of dangerous drugs were found in his trouser pocket. During custody, he confessed to the Chief Inspector by stating that "saya ada simpan lagi "*pek hoon*" dalam rumah saya sewa punya".

Following that, 155.30 gm of heroin was recovered. The information which was given to the Chief Inspector during the interrogation and at the house where the heroin were recovered was written by him on piece of paper which was produced in Court and marked Exh. P2.

On submission, the appellant's Counsel referred to s. 27 of the Evidence Act 1950, and s. 37A of the Dangerous Drugs Act 1952 and submitted that the latter overrided the former. He contended that there must be a caution in this case in accordance with s. 37A(b) of the Dangerous Drugs Act. Counsel stated that there was no caution given after the two statements made by the appellant which were recorded in Exh. P2, thus inadmissible as evidence.

The issue in this appeal was whether statements made by the appellant under s. 37A of the Dangerous Drugs Act covered information received from a person accused of any offence in custody of a police officer under s. 27 of the Evidence Act 1950. It must be stated here that all statements if they fall within the province s. 27 are admissible in the Court of law and such statements are not repugnant to the amended s. 113 of the Criminal Procedure Code.

Held:

[1] Although s. 37A of the Dangerous Drugs Act is substantially similar to the amended s. 113 of the Criminal Procedure Code, it does not override s. 27 of Evidence Act. The amended s. 113 does not contain any absolute prohibition of statements made to the police during police investigation. The amended s. 113 stand by itself and does not in any was affect s. 27 and both sections stand independently of each other and are valid in law.

[2] Firstly s. 27 is an exception to the prohibition imposed by the preceding ss. 24, 25 and 26 of the Evidence Act, it should be strictly construed and applied. Secondly, it must be borne in mind that for s. 27 of the Evidence Act to apply, the information must be such as has caused discovery of a fact. In other words, the fact must be the consequence and the information the cause of its discovery. Moreover the information must relate distinctly to the fact discovered.

[3] It is fallacious to treat 'fact discovered' within s. 27 as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact.

[4] It must also be observed that the legislature has used the expression "information" in s. 27 of the Evidence Act and therefore did not intend it to have the same meaning as a statement. The meaning of information includes knowledge derived by the person informed by the accused as well as the means taken to import that knowledge.

[Appeal dismissed, conviction and sentenced confirmed.]

Cases referred to:
Public Prosecutor v. Rosyatimah bte. Neza & Anor. [1989] 2 CLJ (Rep) 364
Krishnan v. Public Prosecutor [1987] 1 MLJ 129
Chong Soon Koy v. Public Prosecutor [1977] 2 MLJ 78
Pulukari Kotayya v. King Emperor 74 I.A. 65

Legislation referred to:
Evidence Act 1950, ss. 24, 25, 26, 27
Dangerous Drugs Act 1952, s. 37A
Criminal Procedure Code, ss. 113, (1)

For the appellant - Mr. Jagjit Singh; M/s. Jagjit Singh & Co.
For the respondent - Mr. Stanley Issac; DPP

JUDGMENT

Gunn Chit Tuan J:

The appellant was tried for an offence of tracfficking in dangerous drug, to wit, 155.30 grammes of heroin under s. 39B(1) of the Dangerous Drugs Act 1952 (Revised 1980). He was found guilty and convicted by the High Court at Kuala Lumpur and sentenced to death. He appealed against the conviction and sentenced, and his petition of appeal there were six grounds of appeal. Mr. Jagjit Singh, Counsel for the appellant, told the Court that the following grounds (i) and (iii) should be taken together as the appellant's main grounds of appeal:

(i) The learned Judge erred in law in that he had failed to evaluate the evidence by the Prosecution relating to the information leading to discovery;

(iii) The learned Judge erred in law in allowing and admitting inadmissible evidence.

We considered that the above grounds were the only ones worthy of consideration and the following were the relevant facts of this case in so far as this appeal and our decision are concerned.

The appellant was arrested at Jalan Kalang, off Jalan Sungei Besi, Kuala Lumpur on 1 September 1983 at about 3.40 p.m. At the time of his arrest 5 packets containing 15.5 grammes of dangerous drugs were found in his trouser pocket. After his arrest the appellant was interrogated by Chief Inspector Mohamed Yusof in Mohamed (P.W.1) who was the officer

who had arrested him. Three days after interrogation the appellant said to Chief Inspector Mohamed Yusoff "Saya ada simpan lagi *"pek hoon"* dalam rumah saya sewa punya - Taman Midah - boleh tunjuk sekarang". The appellant then told Chief Inspector Mohamed Yusoff and a police party to a room in house no. 76, Jalan Midah Besar, Taman Midah, Kuala Lumpur, which was rented by him from the mother of a private tutor called Lee Oi See (P.W.3) and there in that room the appellant said "Itu *"pek hoon"* ada sana, beg punya dalam". Then with his right forefinger, although his hand were handcuffed, he pointed at yellow paper bag (P.7) which was recovered. Inside that bag was a plastic pocket (P.9) which contained according to the Government Chemist 155.30 grammed of heroin. The information which was given to Chief Inspector Mohamed Yusof during interrogation and at the house in Taman Midah was written by him on piece of paper which was produced in Court and marked Exh. P.2. The police was also recovered and sized from the appellant's room a weighing scale (P.12) and a restricted passport (P.11) belonging to the appellant and later issued a search list (P.3) which was acknowledge by him.

Mr. Jagjit Singh referred to s. 27 of the Evidence Act 1950 and s. 37A of the Dangerous Drugs Act 1952, and submitted that the latter overrides the former. He contended that there must be a caution in this case in accordance with the following proviso (b) to s. 37A of the Dangerous Drugs Act:

> (b) In the case of a statement made by such person after his arrest, unless the Court was administered to him in the following words or words the like effect -
>
> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.
>
> Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.

Counsel stated that there was no caution given after the two statements made by the appellant which were recorded in Exh. P.2 which, he submitted, was together with the statements themselves therefore inadmissible as evidence. Counsel conceded that the appellant was arrested on 1 September 1983 for an other offence but contended that the issue in this apeal was whether statements made by the appellant under s. 37A of the Dangerous Drugs Act covered information received from a person accused of any offence in the custody of a police officer under s. 27 of the Evidence Act 1950 ? He referred to the recent judgment of the High Court at Ipoh in *Public Prosecutor v. Rosyatimah bte. Neza & Anor.* [1989] 2 CLJ (Rep) 364 in which case Peh Swee Chin J. held, *inter alia*, that s. 37A of the Dangerous Drugs Act is in *pari materia* with s. 113 of the Criminal Procedure Code and made *Rosyatimah's* answer to ASP Azmi inadmissible if, *inter alia*, it was made after he arrest and no caution was administered to her before it was made. We would agree that any statement made by a person after his arrest would be inadmissible under proviso (b) to s. 37A of the Dangerous Drugs Act if it amounts to a confession and no caution was administered beforehand or it was no given as soon as possible thereafter. We would however point out that the learned Judge was not concerned in that case with the issue as to whether such statement was admissible under s. 27 of the Evidence Act 1950.

Counsel for the appellant also referred to *Krishnan v. Public Prosecutor* [1987] 1 MLJ 292, 293 in which case this Court held that a statement of the accused to the investigation officer containing admissions was wrongly admitted in evidence as the accused had then been arrested and no caution had been administered under s. 113(1) of the Criminal Procedure

Code, nor was any caution administered soon after the circumstances envisaged under proviso (b) to that subsection. The Court also held in that case that the statement contained which was not admissible under s. 27 of the Evidence Act, as it included more that information which was distinctly relates to the facts discovered.

The Deputy Public Prosecutor in his submission stated that the point canvassed before us was not taken up before the learned Judge in the High Court. He also stated that there was no authority on the interplay between the s. 27 of the Evidence Act 1950, and s. 37a of the Dangerous Drugs Act 1952. However, he referred to *Public Prosecutor v. Sandra Margaret Birch* [1977] 1 MLJ 129, 130 and pointed out that the High Court at Penang had dealt with the interplay of s. 27 of the Evidence Act 1950, and s. 113 of the Criminal Procedure Code (F.M.S. Cap 6). In that case Arulanandom J. (as he then was) held held that all the statement if they fall within the province of s. 27 of the Evidence Act are admissible in the Courts of law and such statements are not repugnant to the amended s. 113 of the Criminal Procedure Code. The learned Judge also pointed that the old s. 113 of the Criminal Procedure Code imposed an absolute prohibition of statements made by the police during police investigation. We would agree with the dictum of the learned Judge in that case that the amended s. 113 of the Criminal Procedure Code stands by itself and does not in any way affect s. 27 of the Evidence Act and both sections stands independently of each other and are valid in law. The amended s. 113 of the Crimina Procedure Code does not make any reference to s. 27 of the Evidence Act is neither abrograted nor repealed by implication.

After a brief reference to the following subsection (3) of s. 37A of the Dangerous Drugs Act 1952, which ties up that ACt with the Criminal Procedure Code:

> (3) Where a statements is purported to be made by a person charged with an offence against this Act under and in accordance with s. 113 of the Criminal Procedure Code, the statement so made by shall be deemed to have been made under and in accordance with this section.

The learned Deputy referred to the Federal Court case of *Chong Soon Koy v. Public Prosecutor* [1977] 2 MLJ 78, 79. In that case it was held, *inter alia*, that a statement relating to the discovery of firearm and ammunition was rightly admitted in evidence. Suffian L.P. (as he then was) referred to the operation of s. 27 of the Evidence Act which read as follows:

> When any fact is disposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether such information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

and stated that the discovered embraces the place from which the pistol and ammunition were produced and the knowledge of the accused as to that. As for the information supplied by the accused relating distinctly to the fact thereby discovered, he pointed out that the information with regard to the firearm and some ammunition which the appellant had hidden in the Berapit Hills in Bukit Mertajam was admissible as evidence on the authority of the following passage in the judgment of the Privy Council in *Pulukuri Kottayya v. King Emperror* 74 I.A. 65 at p. 77:

> ... In their Lordship's view, it is fallacious to treat the 'fact discovered' within the section as equivalent to object produced; the fact embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as the past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not

lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered in very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissble since they do not relate to the discovery of the knife in the house of the informant.

Finally the learned Deputy also contended that the handsing of the accused pointing to the yellow paper bag (P.7) in which plastic packet containing the heroin (P.9) was recovered amounted to information within the meaning of s. 27 of the Evidence Act 1950.

Although we considered that s. 37A of the Dangerous Drugs Act, which we found is substantially similar to the amended s. 113 of the Criminal Procedure Code, does not override s. 27 of the Evidence Act 1950, we would take this opportunity to repeat and to add a few words to what has been said about this letter section in other cases decided previously including those cited to us. Firstly as s. 27 is an exception to the prohibtion imposed by the preceding ss. 24, 25 and 26 of the Evidence Act, it should be strictly construed and applied. Secondly it must be borne in mind that for s. 27 of the Evidence Act to apply, the information must be such as has caused discovery of a fact. In other words the fact must be the consequence and the information the cause of its discovery. Moreover the information must relate distinctly to the fact discovered. (*Chong Soon Koy v. Public Prosecutor* [1977] 2 MLJ 78, 79; *Pulukuri Kotayya v. King Emperor* 74 I.A 65 at p. 77)

The expression "fact" is defined in s. 3 of the Evidence Act as follows:

> "fact" means and includes -
>
> (a) anything, state of things or relation of things capable of being perceived by the senses;
>
> (b) any mental condition of which any person is conscious.

As pointed out by Suffian LP (as he then was) in *Chong Soon Koy v. Public Prosecutor* [1977] 2 MLJ 78, 79 their Lordships of the Privy Council in *Pulukuri Kotayya v. King Emperor* 74 I.A 65 at p. 77 had observed that "it is fallacious to treat 'fact discovered' within s. 27 as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact".

It must also be observed that the legislature has used the expression "information" in s. 27 of the Evidence Act and therefore did not intend it to have the same meaning as a statement. Although that expression is not defined in the Evidence Act, unlike a statement, it includes knowledge derived by the person informed by the accused as well as the means taken impart that knowledge.

Having perused the judgment of the learned Judge we were satisfied that he did consider and evaluate the evidence led by the prosecution relating to the information leading to the discovery of the drug. We were also satisfied that the learned Judge did not err in law in allowing or admitting inadmissible evidence. After considering the provisions of s. 167 of the Evidence Act which is as follows:

> 167. The improper admission or rejection of evidence shall not be ground in itself for a new trial or reversal of any decision in any case if it appears to the Court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence, it ought not to have varried the decision.

We were satisfied that there was sufficient evidence in this case to prove the guilty of the appellant and to justify his conviction. We therefore dismissed the appeal and confirmed the conviction and sentence on the appellant.

Also found at [1989] 2 CLJ 1168